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81-111
No.

In The

Supreme Court of the United States

October Term, 1981

- -

JOSEPH ARNAO and JOEY ARNAO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

- -

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered May 18, 1981.

QUESTION PRESENTED

What standards ought apply to an indictment resulting from perjured testimony or testimony as to which elements bearing on whether it was perjury were withheld from the grand jury.

THE PARTIES

The parties in the Second Circuit appeal were United States of America, Appellee, and Anthony Giacalone, Joseph Arnao and Joey Arnao, Appellants. The indictment and Second Circuit caption used date of birth 7/11/37 to identify Joseph Arnao and date of birth 8/3/41 to identify Joey Arnao, whose name is also Joseph.

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CITATION TO OPINIONS BELOW

The Court of Appeals affirmed petitioners' conviction in a Memorandum Judgment, not reported, annexed as Appendix A. Excerpts relevant to the question presented from the December 19, 1980 District Court Opinion, not reported, are annexed as Appendix B.

JURISDICTION

The Court of Appeals judgment was entered May 18, 1981. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

PROVISION INVOLVED

The provision involved is so much of the Fifth Amendment of the United States Constitution as provides:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury...."

STATEMENT OF THE CASE

Petitioners Joseph Arnao and Joey Arnao, and another defendant Anthony Giacalone, were convicted on December 22, 1980 in the United States District Court for the Southern District of New York (Robert W. Sweet, J.) of conspiracy to embezzle funds from Citibank, N.A. and other related crimes. Joseph Arnao received a prison sentence of three and one-half years, three years probation to follow, and fines of $24,000. Joey Arnao's sentence was two years imprisonment, three years probation to follow, and fines of $21,000.

The Government's charge was that John Palacio, a Citibank employee, decided to embezzle a $3,000,000 item from the bank and ultimately accomplished that with the aid of one Joseph Lubin, joined in certain respects by Giacalone, the Arnaos and others. Lubin originally testified twice before a grand jury in August, 1978. His testimony denying any complicity in the scheme,

was untruthful. Lubin was then arrested, agreed to cooperate, and gave grand jury testimony to a new panel in April and May 1979. During the May session the Assistant United States attorney marked as exhibits Lubin's August 1978 testimony. She then asked if "there [are] corrections that you [Lubin] wish to make in the testimony you gave on those two occasions" (Tr. May 2, 1979, p. 2). The grand jury was not told that the earlier testimony was not merely incorrect but deliberately untruthful. The grand jury indicted the Arnaos thinking it had an inaccurate witness rather than a perjurious one (the Arnaos' indictment was based solely on Lubin's testimony). In June 1980 an additional grand jury returned a superseding indictment. It too was unaware of the fact that Lubin had previously given perjured testimony. Both the district court and the Court of Appeals found the indictments valid.

REASONS FOR GRANTING THE WRIT

The issue presented in this petition concerns perjured testimony and grand jury proceedings. The issue is federally important and has not been but ought be settled by this Court. In addition, the Circuits have been in conflict over the question.

This Court has said that facially valid indictments returned by unbiased grand juries generally cannot be challenged because of the evidence the Government presented to secure the indictment. Costello v. United States, 350 U.S. 359 (1950); United States v. Calandra, 414 U.S. 338 (1974). By the same token the Court has made clear that the judgment whether to indict must come independently from the grand jury, not the prosecutor. United States v. Dionisio, 410 U.S. 1 (1972); Branzburg v. Hayes, 408 U.S. 665 (1972); Wood v. Georgia, 370 U.S. 375 (1962); Stirone v. United States, 361 U.S. 212 (1959). Within

those general standards the lower courts have attempted to fashion guidelines for instances in which a grand jury has indicted after hearing perjured testimony or testimony with vital facts withheld so that the grand jury could not validly assess credibility. The Ninth Circuit, on one occasion, suggested that if the perjury was material and jeopardy had not attached, the proper remedy was the indictment's dismissal. United States v. Basurto, 497 F.2d 781 (9th Cir. 1974). The Second Circuit and certain district courts within that Circuit have taken the same approach. United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979) (prosecutor may not mislead grand jury nor engage in fundamentally unfair tactics); United States v. Guillette, 547 F.2d 743, 752-53 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977) (new indictment when witness lied); United States v. Provenzano, 440 F.Supp. 561

(S.D.N.Y. 1977) (evidence withheld from grand jury); United States v. Goldman, 451 F.Supp. 518 (S.D.N.Y. 1978) (dismiss when perjured testimony from crucial witness); United States v. Gallo, 394 F.Supp. 310 (D.Conn. 1975). The Eighth Circuit has also. United States v. Smith, 552 F.2d 257 (8th Cir. 1977). On the other hand the Fifth and Tenth Circuits have raised questions about Basurto when the perjury was not known to the prosecutor or was immaterial. United States v. Cathey, 591 F.2d 268 (5th Cir. 1979); Talamonte v. Romero, 620 F.2d 784 (10th Cir. 1980). And on facts distinguishable from those here both the Ninth Circuit, and Justice Rehnquist on an application to stay enforcement, thought Basurto ought be limited in its application. United States v. Bracy, 566 F.2d 649 (9th Cir. 1977), application for stay of enforcement denied, 435 U.S. 1301 (Rehnquist, J.), cert. denied, 439 U.S. 818 (1978). See also Kaplan

v. United States, 554 F.2d 958, 970 (9th Cir. 1977) (prejudice to defendant required for finding of materiality); United States v. DeLeo, 422 F.2d 487 (1st Cir.), cert. denied, 397 U.S. 1037 (1970) (no dismissal when other evidence present); United States v. Bowers, 534 F.2d 186 (9th Cir. 1976), cert. denied, 429 U.S. 942 (1977) (witness gave subsequent truthful testimony); United States v. Johnson, 618 F.2d 60 (9th Cir. 1980) (grand jury knew of perjury).

The questions addressed in these cases ought be resolved by this Court so that the Government, defendants, and the lower courts will know the guidelines to be applied. Those questions include the impact of whether the prosecutor knew of the perjury, the proper role of materiality, and the effect of jeopardy for purposes of the remedy. This case is appropriate to resolve the issues because the Prosecutor knew that

the witness had once before committed perjury, but did not inform the grand jury of that (although the grand jury was told it should closely scrutinize the witness's testimony since he was a co-conspirator).

CONCLUSION

The question this Petition presents is important, unsettled, and the subject of conflict between the Circuits. See 8 Moore Federal Practice, Sec. 6.04[2] (2d ed. 1981) (tracing division of Circuits). Certiorari should be granted.

Respectfully submitted,

PETER ANTIOCO, ESQ.
Attorney for Petitioners
Joseph Arnao and
Joey Arnao

Peter Antioco, Esq.
Donald E. Nawi, Esq.
Of Counsel

July 15, 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the eighteenth day of May one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING B. KAUFMAN,

HONORABLE JAMES L. OAKES,

HONORABLE JON O. NEWMAN,

Circuit Judges,

UNITED STATES OF AMERICA, Appellee, v. ANTHONY GIACALONE, JOSEPH ARNAO (dob: 7/11/37), and JOSEPH ARNAO (dob: 8/3/41), Defendants-Appellants.	80-1480

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

1. The Government's presentation of testimony and information to the January 1979 and June 1980 grand juries that returned the challenged indictments in this case was proper in all respects. The prosecutor elicited testimony from witness Joseph Lubin indicating that statements made to a previous grand jury were incorrect. No misconduct occurred because the prosecutor informed the grand jury of this previous perjurious testimony, United States v. Basurto, 497 F.2d 781, 784 (9th Cir. 1974); United States v. Gallo, 394 F.Supp. 310, 315 (D. Conn. 1975), and cautioned it to scrutinize carefully his remakrs. Moreover, since the June 1980 Additional Grand Jury which presented a superseding indictment was instructed that it could call live witnesses, its decision to rely on the prosecutor's hearsay account of the evidence previously obtained by another panel was not improper. United States v. Schleslinger, 598 F.2d 722 (2d Cir.), cert. denied, 444 U.S. 880 (1979).

2. All material exculpatory evidence was disclosed in a timely fashion to defendants, as is required by Brady v. Maryland, 373 U.S. 83 (1963). Judge Sweet properly found that the grand jury testimony of Manny Yglesias was not exculpatory. Alternatively, in light of all evidence presented at trial, this material, as well as information regarding the reduction of Helen Lubin's sentence, did not create a reasonable doubt that would otherwise not exist. Oster v. United States, 577 F.2d 782, 786 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979), citing United States v. Agurs, 427 U.S. 97, 112-13 (1976).

3. In light of the defendants' aggressive cross-examination of Joseph Lubin, the Government's reesamination constituted permissible

rehabilitation of the witness. See United States v. Arroyo-Angulo, 580 F.2d 1137, 1146 (2d Cir.), cert. denied, 439 U.S. 913 (1978); 3 Weinstein's Evidence 607[08] (1978).

4. Because the Government may ask the jury to draw any inferences fairly suggested by the defense, United States v. Suarez, 588 F.2d 352, 354 (2d Cir. 1978), and because Judge Sweet's curative instructions informed the jury that counsel's views on the preparation of the case should be disregarded, United States v. Rapoport, 545 F.2d 802, 804 (2d Cir. 1976), cert. denied, 430 U.S. 931 (1977), we reject defendant's claim that the Government's summation was improper.

5. Judge Sweet did not abuse his broad discretion in refusing to hold a post-trial hearing and in declining to remove two jurors accused of trivial misconduct. United States v. Barnes, 604 F.2d 121, 144 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

6. We are satisfied that Judge Sweet did not err in considering hearsay evidence of defendant Giacalone's involvement in organized crime at his sentencing hearing because this evidence was corroborated by surveillance pictures and taped recordings. United States v. Fatico, 579 F.2d 707 (2d Cir. 1978); 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). Moreover, the double jeopardy clause of the Fifth Amendment was not violated where Judge Sweet recalled Giacalone several hours after imposing sentence to inform him that his sentence was to be served consecutively with the sentence currently being served for another conviction. United States v. Davidson, 597 F.2d 230, 230-33 (10th Cir.), cert. denied, 444 U.S. 861 (1979); United States v. DiLorenzo, 429 F.2d 216, 221 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971).

7. We have examined defendants' other claims raised in this appeal and find them to be without merit.

The mandate shall issue forthwith.

IRVING R. KAUFMAN

JAMES L. OAKES

JON O. NEWMAN,
Circuit Judges.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA

- against -

ANTHONY GIACALONE,
a/k/a "Tony",
ANTHONY DePasque,
a/k/a "Tony", a/k/a "Mash",
JOSEPH ARNAO, (date of birth:
7/11/37, and
JOSEPH ARNAO, (date of birth:
8/3/41),

Defendants.

(S) 80 Cr. 123
(RWS)

O P I N I O N

- x

OPINION

EXCERPTS PERTINENT TO QUESTION
PRESENTED IN THE PETITION

Sweet, D.J.

On October 10, 1980, after a seven-week trial, Anthony Giacalone, Joseph Arnao, d.o.b. 7/11/37, and Joseph Arnao, do.b. 8/3/41, were convicted of conspiracy and various other offenses relating to the embezzlement of $3,000,000 from Citibank, N.A., in August of 1976. All three have moved for an order setting aside the verdict of the jury and either dismissing the indictment or, in the alternative, granting a new trial. In the motion to dismiss the

indictment, they are joined by co-defendant Anthony DePasque, who was severed from the case due to an illness during the last week of trial. Most of the grounds urged in support of these motions have been asserted in motions made and denied during the trial; a few are raised now for the first time. All of the motions are denied, for the reasons explained at trial and those set forth below.

* * *

Joey Arnao's second claim in support of his motion is based on the government's alleged failure to inform the first voting grand jury and the grand jury that returned the superceding indictment in this case of factors affecting the credibility of witness Joseph Lubin, in particular, an alleged perjury by Lubin before a 1978 grand jury. Insofar as this claim relates to that alleged perjury, it is joined in by Anthony Giacalone, Joseph Arnao, and Anthony DePasque.

The government's submissions in response to this contention satisfy me that the first voting grand jury was adequately apprised of Lubin's prior false testimony, and that both voting grand juries were properly cautioned to evaluate his credibility in view of his

status as an accomplice and his prior criminal record.

The cases cited by the defendants in support of this aspect of their post-trial requests for relief are inapposite. In United States v. Gallo, 394 F. Supp. 310 (D.Conn. 1975), the prosecutor failed to instruct the grand jurors who returned the superceding indictment regarding evaluation of the hearsay evidence before them. As indicated above, that is not the case here. In Gallo, the first indicting grand jury heard perjured testimony, and the second indicting grand jury was not told of that fact. Here, there is no reason to believe that either voting grand jury heard perjurious testimony. In United States v. Basurto, 497 F.2d 781 (9th Cir. 1974), the Ninth Circuit held that a defendant's due process rights are violated by being compelled to stand trial on an indictment based partially on material, perjured testimony. In Basurto, the indicting grand jury itself heard the perjured testimony, and the prosecutor was subsequently apprised of that fact but failed to inform the grand jury or the court of it. This case is distinguishable. Here, unlike in Basurto, neither voting grand jury heard the allegedly perjurious testimony, and the prosecutor acted according to her duty in

calling Lubin's prior false statements to the attention of the first voting grand jurors and in cautioning both voting grand juries about his credibility. Furthermore, the government disclosed all of Lubin's grand jury testimony to defense counsel early enough in the trial to allow them time to prepare to impeach him; indeed, in the government's opening argument it called the trial jury's attention, and defense counsel's attention, to the fact that Lubin was a perjuror. Finally, Napue v. Illinois, 360 U.S. 264 (1959) involved a prosecutor's failure to correct a trial witness's testimony that he knew to be false. There has been no claim of knowing use of perjured trial testimony here.

I find no due process violation with regard to any of Lubin's grand jury testimony or the government's treatment of it. Therefore, the defendants' claim based upon that testimony and the government's conduct with regard to it fails.

* * *

For all of the foregoing reasons, all post-trial motions for dismissal of the indictment and for a new trial are denied.

IT IS SO ORDERED

DATED: New York, N.Y.
December 19, 1980

Robert W. Sweet
U.S.D.J.